In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1031

NED C. BAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–4) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1–4) was entered on December 21, 1965. A petition for rehearing was denied on January 28, 1966 (Pet. 8). The petition for a writ of certiorari was filed on February 17, 1966. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

211-872—66

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain a finding that petitioner failed to file income tax returns for 1957 and 1959.

2. Whether, if the foregoing question is answered in the affirmative, there was sufficient evidence of willfulness.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.
>
> (26 U.S.C. 1958 ed., Sec. 7203.)

STATEMENT

Petitioner was charged in a two-count information with willfully failing to file individual income tax

returns for the years 1957 and 1959, in violation of 26 U.S.C. 7203 (R. 6–7).[1] After a trial by jury petitioner was convicted (R. 4) and sentenced to imprisonment for one year on each count, the sentences to run consecutively, and to pay a fine of $2,500 on each count, the fines to be cumulative (R. 7–8). The evidence may be summarized as follows:

It was stipulated (Govt. Ex. 7) that petitioner received gross income of $16,248.20 in 1957 and $31,961.88 in 1959. The evidence showed, further, that petitioner received additional gross income in 1957 in the amount of $14,500 for services rendered (R. 29) and additional gross income in 1959 as real estate commissions in the form of two checks, one for $2,833 (Govt. Ex. 8) and one for $7,000 (Govt. Ex. 9) (R. 25–26, 87). Although petitioner filed individual income tax returns for 1955, 1956, 1958, 1960, and 1961 (Govt. Exs. 1 through 5; R. 10–11), an exhaustive search at the office of the District Director in Chicago, Illinois, failed to disclose any returns for 1957 and 1959 or any record showing that petitioner had filed returns for those years (R. 15–24).

Petitioner was delinquent in his tax payments with respect to the various returns which he did file (Govt. Ex. 6), and the government in 1960 levied on his wages. When the levying officer went to see petitioner, the latter walked out of his office, denying his identity (R. 30–31). A special agent attempted to see petitioner at his house in February 1963. When peti-

[1] "R." refers to petitioner's appendix filed in the court of appeals.

tioner telephoned the next day, the special agent informed him that no returns for 1957 and 1959 could be found and suggested a conference. Petitioner stated that he had filed the returns but asked for a delay of several weeks. From that time until the following October, the special agent repeatedly attempted, by letter and in telephone conversations, to persuade petitioner to come in for a conference, but petitioner each time asked for a delay, with the result that the special agent never saw him until the time of the trial (R. 40–42, 49).

In January 1964, an attorney (Mr. Maloney) mailed to the special agent two documents alleged to be copies of filed returns for 1957 and 1959 (Govt. Ex. 16; R. 94–95). At the trial, and after a witness called by the government testified that he paid petitioner $14,500 in 1957 for services rendered (R. 29), petitioner introduced in evidence a new purported copy of his alleged 1957 return. This copy (Deft. Ex. 16) reported the $14,500 payment, in contrast to the copy previously received from Maloney which reported only $3,800 from that source (R. 71–72). Petitioner testified in his own defense, and gave contradictory explanations concerning his preparation of the varying versions of the tax returns that he claimed to have filed (R. 72, 74–79, 91).

At the time of sentencing, the trial judge referred to his prior denial of motions for acquittal and observed (page 12 of the transcript of proceedings on January 29, 1965):

> I am still of the same opinion [that the evidence was sufficient], and I might add that my opinion was strengthened after I heard the testimony of the defendant and his wife and watched their performances on the witness stand.

ARGUMENT

Petitioner challenges only the sufficiency of the evidence to sustain the conviction (Pet. 10–21). After a careful review of the record, the court of appeals correctly concluded that the "jury verdict is supported by substantial evidence" (Pet. App. 4). There is no occasion for further review of this purely evidentiary question.

There was evidence that an exhaustive search of Internal Revenue files failed to reveal any evidence that petitioner filed returns for 1957 and 1959, and the jury was clearly justified in concluding that petitioner's conduct during the investigation was inconsistent with that of a taxpayer who actually had filed returns. Petitioner's evasive testimony (R. 70–93) strengthened this inference.

Once the jury concluded that petitioner's testimony that he had filed returns for 1957 and 1959 (R. 72) was false they could hardly escape the further conclusion that the failure to file was "willful" under any definition of that term. See *United States* v. *Murdock*, 290 U.S. 389; cf. *United States* v. *Litman*, 246 F. 2d 206, 208 (C.A. 3), certiorari denied, 355 U.S. 869.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

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